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No. 81-24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Cross-Petitioners,

—v.—

SUMITOMO SHOJI AMERICA, INC.,

Cross-Respondent.

RESPONSE TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

In its petition for a writ of certiorari filed June 6, 1981 (Docket No. 80-2070), Sumitomo Shoji America, Inc. ("Sumitomo") requests review of a decision of the United States Court of Appeals for the Second Circuit, 638 F.2d 552 (App. A to petition, 1a-15a), affirming the denial of Sumitomo's motion to dismiss plaintiffs' civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Sumitomo contends that the practice of filling management level positions with Japanese nationals is an exercise of the employment right provided by Article VIII(1) of the 1953 Treaty of Friendship, Commerce and

Navigation between the United States and Japan, 4 U.S.T. 2063 (1953) (the "Treaty"), and is not limited by Title VII (Sumitomo's petition at i).

In their cross-petition filed July 1, 1981, plaintiffs ask this Court to consider two narrower questions: (1) whether Sumitomo as a locally-incorporated subsidiary of a Japanese investor may claim the employment right provided by Article VIII(1) of the Treaty; and (2) whether the Second Circuit properly applied Title VII's "bona fide occupational qualification" ("bfoq") exception to the Treaty's employment right provision (cross-petition at i).

I.

The Second Circuit was correct in its holding that a locally-incorporated subsidiary of a Japanese corporation may assert the Treaty's employment right provision. Cross-petitioners erroneously read into the Second Circuit's decision a "ruling" that Sumitomo is a Japanese corporation (cross-petition at 7-8). However, the Court below made no such determination regarding corporate nationality. It stated explicitly:

> [T]he Treaty's provisions may be invoked by a wholly-owned Japanese subsidiary incorporated in the United States to the same extent that they may be availed of by Japanese corporations or firms operating in the United States.

App. A to Sumitomo's petition at 7a.

The Second Circuit identified clearly its reason for reading the Treaty in this manner:

> To hold that the Japanese business enterprise forfeits its rights under the Treaty merely because it chooses to function through a wholly-owned locally-incorporated subsidiary would in our view disregard substance for form, something which we have previously rejected in treaty construction. . . . [T]he purpose of the Treaty . . . was not to protect foreign investments made through

> branches, but rather to protect foreign investments generally.

App. A to Sumitomo's petition at 7a-8a.

In *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353 (5th Cir. 1981) (App. F to Sumitomo's petition, 63a-97a), the Fifth Circuit came to the same conclusion, after careful analysis of the negotiating history of the Treaty:

> [T]he district court's interpretation . . . would create an unreasonable distinction between treatment of American subsidiaries of Japanese corporations on the one hand, and branches of Japanese corporations on the other.

App. F to Sumitomo's petition at 71a.* In holding that "C. Itoh-America, a New York corporation wholly owned by a Japanese parent, may assert all rights extended to 'companies of either Party' by the Japanese treaty. . . ," the Fifth Circuit expressly denied that the nationality of a company under the Treaty is to be determined by the nationality of its shareholders. App. F to Sumitomo's petition at 71a & n. 5.

These conclusions follow from the intent of the drafters that foreign investors be permitted to establish branches, to organize or acquire companies under local law, and "to control and manage enterprises which they have established or acquired." Treaty, Article VII(1). In using that language, the Treaty drafters took account of the practical realities of private international investment, including the fact that overseas subsidiaries are subject to their parent's control, despite their separate legal form.** Thus, if Sumitomo were not able to

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* In a reply brief in support of its petition filed August 25, 1981, Sumitomo called to this Court's attention an order of the Fifth Circuit, dated August 7, 1981, granting rehearing en banc of the decision in *Spiess v. C. Itoh, supra.*

** As the Second Circuit noted, to implement the Treaty's employment right provision, the State Department has issued regulations which facilitate entry into the United States of Japanese nationals to work as "treaty traders" for enterprises established in the United States under

(footnote continued on next page)

claim the employment right of Article VIII(1), the drafters' intent to assure the control and management provided for by Article VII(1) would be frustrated.*

The authorities which cross-petitioners cite in support of their formalistic argument that Sumitomo is by definition a corporation of the United States and not of Japan, and therefore not entitled to claim the Article VIII(1) employment right, are inapposite to the conduct of business under modern postwar friendship, commerce and navigation ("FCN") treaties. Corporate nationality is simply not an issue in this case.

II.

Cross-petitioners also contend that Article VIII(1) of the Treaty provides no more than a national treatment right with regard to employment of management level personnel where the investor chooses to establish itself in the host country as a locally-incorporated subsidiary. However, the Treaty does not contain an across-the-board national treatment standard; it provides standards of treatment on an article-by-article basis. Thus, some rights under the Treaty are granted contingent on national treatment, some are granted contingent on most-favored-nation treatment, and some are not contingent and therefore are preferential or, as they are sometimes called, "absolute" rights. *See Spiess v. C. Itoh, supra,* App. F to Sumitomo's petition at 74a-75a. The employment right provided in Article VIII(1) is cast in non-contingent language.

Article VII of the Treaty. App. A to Sumitomo's petition at 6a. Nonimmigrant treaty trader status is conferred by the Department of State and the Immigration and Naturalization Service in accordance with § 101(a)(15)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(E)(i), and Article I(1) of the Treaty.

* Moreover, decisions of this Court provide additional support for Sumitomo's contention that it is entitled to rely on Article VIII(1), both on its own behalf as the employer, Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-53 (1970), and as the subsidiary of the Japanese investor, Craig v. Boren, 429 U.S. 190, 194-95 (1976).

In its Executive Report on several FCN treaties ratified in 1953, including the Japanese Treaty, the Senate indicated the non-contingent nature of the Article VIII(1) employment right. *See* S. Exec. Rep. No. 5, 83rd Cong., 1st Sess. at 4 (1953). *See also* S. Exec. Rep. No. 5, 81st Cong., 2d Sess. at 6 (1950), making observations to the same effect with respect to a similarly-worded employment provision contained in a proposed FCN treaty with Uruguay. The non-contingent nature of the Article VIII(1) employment right is recognized also by leading commentators on FCN Treaties. *E.g.*, Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 386 (1956); S.D. Metzger, *International Law, Trade and Finance: Reality and Prospects* 151 (1963); *see also* Note, *Commercial Treaties and the American Civil Rights Law: The Case of Japanese Employers*, 31 Stan. L. Rev. 947, 952-54 (1979).*

Cross-petitioners are therefore plainly wrong in asserting that a national treatment standard should apply to the right granted by Article VIII(1) of the Treaty to employ home country nationals in key positions.

III.

The Second Circuit assumed, without discussion, that plaintiffs' claim regarding hiring practices based on nationality sets forth a claim of "national origin" discrimination under Title VII. App. A to Sumitomo's petition at 14a. That assumption

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* Similarly, with respect to the Treaty's Article I(1) right of entry and stay in the United States of the Japanese nationals Sumitomo employs in treaty trader positions, Walker has observed:

> As concerns natural persons, right-of-entry [for aliens] cannot, by definition, be assured on a national treatment basis. . . . Therefore, the approach devised takes the form of a non-contingent rule which positively assures the reciprocal admission, and indefinite sojourn, of individuals who function in an international commerce or investment capacity.

Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805, 813 (1958).

conflicts directly with this Court's interpretation of the term "national origin." In *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1974), this Court made clear that the term "national origin" as used in Title VII does not mean nationality:

> [N]othing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.

414 U.S. at 95. *See also Commercial Treaties and the American Civil Rights Laws, supra*, 31 Stan. L. Rev. at 957-958. *Cf. Morton v. Mancari*, 417 U.S. 535 (1974), in which this Court held that preferential hiring rights enjoyed by members of federally recognized Indian tribes were not inconsistent with Title VII, since the preference was "political rather than racial in nature." 417 U.S. at 553, n.24.

By assimilating Sumitomo's hiring on the basis of Japanese nationality to "national origin" discrimination, the Second Circuit created an unnecessary conflict between domestic anti-discrimination law and U.S. international treaty obligations. This is directly contrary to the precept that an act of Congress ought not to be construed to conflict with international treaty obligations of the United States unless Congress' intent to abrogate such treaty obligations is clearly expressed, a rule recognized by the Fifth Circuit in *Spiess v. C. Itoh, supra.* App. F to Sumitomo's petition at 66a; *Cook v. United States*, 288 U.S. 102, 120 (1933).

Therefore, if this Court follows its earlier interpretations of Title VII, it will find that there is no conflict between Title VII and Sumitomo's Treaty-based hiring of Japanese nationals, and that plaintiffs' complaint fails to state a claim upon which relief can be granted.

Cross-petitioners' second question, regarding the scope of the bfoq exception to Title VII, need not be considered. It arises only as a result of the Second Circuit's failure to recognize that the Article VIII(1) employment provision is non-contingent, and its failure to follow the decision of this

Court in *Espinoza, supra*. Therefore, the bfoq question posed by cross-petitioners is not germane to the resolution of this case.

CONCLUSION

The cross-petition reinforces Sumitomo's contention that this case presents an important question of federal law justifying the grant of certiorari and plenary consideration by this Court. However, Sumitomo submits that the narrow formulation of the questions in the cross-petition would unduly constrain this Court's consideration of the case. The Court should address instead the broader question—raised in Sumitomo's petition—whether the right provided by Article VIII(1) of the Treaty to fill management level positions with Japanese nationals is limited by Title VII.

Respectfully submitted,

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